



October 31, 2011

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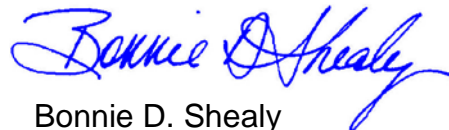
**Re: Covad Communications Company  
Docket No. 2011-387-C**

Dear Jocelyn:

Enclosed for filing please find the Motion for Expedited Review of the Joint Application of DSLnet Communications, LLC and DIECA Communications, Inc. We respectfully request that the Commission perform an expedited review and waive the requirement to hold a hearing in this docket. The South Carolina Office of Regulatory Staff has indicated that they do not object to the motion. If you have any questions, please have someone on your staff contact me.

Very truly yours,

ROBINSON, MCFADDEN & MOORE, P.C.



Bonnie D. Shealy

/bds  
Enclosure

cc/enc: Katherine K. Mudge, Director - State Affairs & ILEC Relations (via email)  
C. Lessie Hammonds, ORS Staff Attorney (via email & U.S. Mail)

**BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA**

**Docket No. 2011-387-C**

Joint Application of	:
	:
<b>DSLnet Communications, LLC,</b>	:
and	:
<b>DIECA Communications, Inc.</b>	:
	:
For Authority to Complete Certain <i>Pro</i>	:
<i>Forma</i> Intra-Corporate Transactions	:

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**MOTION FOR EXPEDITED REVIEW OF APPLICATION**

Comes now the Applicants DSLnet Communications, LLC (“DSLnet”) and DIECA Communications, Inc. d/b/a Covad Communications Company (“DIECA” and together with DSLnet, the “Applicants”), who hereby move pursuant to S.C. Code Reg. 103-829 and other applicable rules of practice and procedure of the South Carolina Public Service Commission ("Commission") that the Commission perform an expedited review of the Joint Application for authority to complete intra-corporate transactions. The Applicants request that the Commission use its discretionary authority to informally dispose of the proceeding without holding a formal hearing. In support of this motion DSLnet and DIECA would show the following:

**FACTUAL BACKGROUND**

1. As described in more detail in the Joint Application, the proposed transaction is an internal *pro forma* reorganization resulting in the merger of DSLnet and other unregulated affiliates into DIECA in order to streamline operations under a single “MegaPath” branded company. The

customers and assets to support the provision of services to the customers will be transferred into DIECA which will become the service provider for those customers.

2. The Applicants are certificated to provide service in South Carolina. DSLnet is authorized to provide local and long distance telecommunications services pursuant to Order No. 1999-365 issued by the Commission in Docket No. 1999-081-C. DIECA is authorized to provide local exchange and interexchange services pursuant to Order No. 2000-0513 issued by the Commission in Docket No. 2000-0133-C. After the transaction is completed DSLnet's customers will continue to receive the same high quality service, at the same rates, and under the same terms and conditions.

3. The Applicants published notice of the filing of the application in area newspapers as required by the Commission. The deadline for filing petitions to intervene in the proceeding was October 28, 2011.

4. The Office of Regulatory Staff does not oppose the Joint Application and does not object to this motion. No other comments or petitions to intervene have been filed.

5. The Applicants filed the verified testimony of Mr. Douglas Carlen on October 19, 2011, in support of the Joint Application. Mr. Carlen's testimony further describes the proposed transaction and asset transfer and its negligible effect on the Applicants' South Carolina customers.

### **ARGUMENT**

5. The Applicants filed their application pursuant to S.C. Code Ann. § 58-9-310. Section 58-9-310 provides that "no telephone utility, without the approval of the Commission after due hearing and compliance with all other existing requirements of the laws of the State in relation thereto, may sell, transfer, lease, consolidate or merge its property, powers, franchises, or privileges

or any of them....” S.C. Code Ann. § 58-9-310 (Supp. 2010). Notice has been published as required by the Commission and any interested party, including the Applicants, has thus had an *opportunity* for a hearing.

6. The Applicants seek expedited review of its application on the grounds that (1) the South Carolina Administrative Procedures Act ("APA") grants the Commission flexibility regarding hearings in contested matters, (2) due process requirements are satisfied if the Applicants waive the right to a hearing when there is no disputed material issue of fact, and (3) notice and the opportunity to present written evidence is sufficient to provide the procedural due process protection required under the APA.

7. Administrative agencies in South Carolina "are required to meet minimum standards of due process. Due process is flexible and calls for such protections as the particular situation demands." *Stono River Environmental Protection Association v. S.C. Dept. of Health and Environmental Control*, 406 S.E.2d 340, 342 (S.C. Sup. Ct. 1992); *Anonymous v. State Board of Medical Examiners*, 473 S.E.2d 870 (S.C. Ct. App. 1996) citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The APA provides that "in a contested case, all parties must be afforded an opportunity for hearing after notice not less than thirty days." S.C. Code Ann. § 1-23-320(a) (Supp. 2010). The APA defines "contested case" as "a proceeding, including but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." S.C. Code Ann. § 1-23-310(2) (Supp. 2010).

The provisions of the APA ensure that procedural due process requirements are satisfied. The APA also provides some flexibility to agencies regarding hearings for contested cases. "Unless

precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default." S.C. Code Ann. § 1-23-320(f) (Supp. 2010). Notice of the Joint Application was published as required by the Commission. Therefore, notice and an opportunity for a hearing have been provided as required by the APA and S.C. Code Ann. Section 58-9-310. The Office of Regulatory Staff does not object to the motion. The Applicants respectfully request that the Commission apply S.C. Code Section 1-23-320(f) of the APA and informally dispose of the proceeding without requiring a formal hearing.

8. Holding a formal hearing "is appropriate where adjudicative facts involving the particular parties are at issue. Conversely, an agency may ordinarily dispense with hearing where there is no genuine dispute as to a material issue of fact." 2 Am. Jur.2d *Administrative Law* § 298. In addition, "the right to a hearing...may be waived." 2 Am. Jur.2d *Administrative Law* § 296.

The Applicants are requesting the hearing be waived and there are no intervenors opposing its proposed transaction in the proceeding. Therefore, there is no material issue of fact to be decided at a formal hearing.

9. Notice and the opportunity to present written evidence would satisfy due process requirements for the Joint Application. Case law in other jurisdictions supports the proposition that holding a hearing is not required in all situations. One case noted that the "flexibility of the scope of due process is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure....There are times when no more is required than notice and the opportunity to present reasons, either orally or in writing, why the proposed action should not be taken." *Bartlett v. Krause*, 551 A.2d 710, 722 (Ct. Sup. Ct. 1988).

Another case noted that "[d]ue process does not always require an administrative agency to hold an evidentiary hearing before it goes about the business it was created to conduct....Sometimes nothing more is required than notice and the opportunity to present reasons, either orally or in writing, why the proposed action should not be taken." *In the Matter of the Request for Solid Waste Utility Customer Lists*, 524 A.2d 386, 393 (N.J. Sup. Ct. 1987). In *Request for Solid Waste*, the Court held that since "the proceeding did not involve any disputed facts, a full evidentiary hearing would have been unnecessary and burdensome, both fiscally and administratively, to the agency." *Id.*

The Joint Applicants have presented information on the proposed transaction in their application and the verified testimony of Douglas Carlen. Since the Office of Regulatory Staff does not object to the motion, the Applicants assert that a full evidentiary hearing on its application is unnecessary.

WHEREFORE, DSLnet and DIECA respectfully requests that the Commission informally dispose of the proceeding without holding a hearing and grant its request for approval of the proposed transaction.

Dated this 31<sup>st</sup> day of October, 2011.

ROBINSON, McFADDEN & MOORE, P.C.

By   
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Attorneys for DSLnet Communications, LLC and  
DIECA Communications, Inc.

**BEFORE  
THE PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA  
DOCKET NO. 2011-387-C**

In Re:

Joint Application of

DSLnet Communications, LLC,  
And DIECA Communications, Inc.

For Authority to Complete Certain  
Pro Forma Intra-Corporate  
Transactions

**CERTIFICATE OF SERVICE**

This is to certify that I, Toni C. Hawkins, a Paralegal with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the person(s) named below the **Motion for Expedited Review of Application** in the foregoing matter by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

C. Lessie Hammonds, ORS Staff Attorney  
SC Office of Regulatory Staff  
1401 Main Street, Suite 900  
Columbia, SC 29201

Dated at Columbia, South Carolina this 31<sup>st</sup> day of October, 2011.



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Toni C. Hawkins